

Summary of Discussion and Feedback Received on the 12/16/2020 National Historic Preservation Act Section 106 Programmatic Agreement (PA) for Florida 404 Assumption

1. EPA received feedback that the Seminole Nation of Oklahoma and the Jena Band of Choctaw Indians should be included in discussions about the Programmatic Agreement (PA).

EPA coordinated with the Advisory Council on Historic Preservation (ACHP) and based on its recommendation used the HUD website (<https://egis.hud.gov/TDAT/>) to identify Indian tribes listed as having current and ancestral interests in the state of Florida. Using the HUD website, EPA identified and invited the following eight federally recognized tribes to consult: the Alabama-Coushatta Tribe of Texas; the Choctaw Nation of Oklahoma; the Coushatta Tribe of Louisiana; the Miccosukee Tribe of Indians of Florida; the Mississippi Band of Choctaw Indians; the Muscogee (Creek) Nation; the Poarch Band of Creek Indians; and the Seminole Tribe of Indians of Florida. This list of federally recognized tribes for which EPA intended to carry out consultation was provided to the ACHP, and the ACHP did not suggest that EPA modify or add to this list. EPA appropriately deferred to ACHP's expertise in this area.

On January 19, 2021, EPA contacted the Seminole Nation of Oklahoma and the Jena Band of Choctaw Indians and provided them copies of the PA, the Operating Agreement between the Florida Department of Environmental Protection and the Florida State Historic Preservation Office, and flow charts that have been developed to demonstrate the process related to permitting. In addition, EPA offered to meet with the two tribes to discuss the PA and the assumption process.

2. EPA received feedback suggesting that the State issuance of a 404 permit is a federal undertaking.

Issuance of a State 404 permit is an action taken by the State under State law. It is not a federal action and is not a federal undertaking for purposes of Section 106 of the National Historic Preservation Act (NHPA).

3. EPA received feedback indicating the approval of Florida's assumption of the Clean Water Act (CWA) Section 404 program was an adverse effect on historic properties.

EPA does not agree that the assumption constitutes an adverse effect on historic properties. In accordance with 40 C.F.R. Part 233, an assumed Section 404 program must be consistent with and no less stringent than the requirements of the CWA and its implementing regulations. EPA has determined that Florida's program is consistent with and no less stringent than the federal requirements that govern the U.S. Army Corps of Engineers' administration of the Section 404 program. In addition, consistent with the NHPA and the ACHP's implementing regulations, the provisions in the PA provide an appropriate process for consideration of any potential impacts during the State's administration of the program, including a process for federal review should a dispute arise.

4. EPA received feedback that it did not provide sufficient time for the consulting parties to review the PA prior to its execution.

The consulting parties, including the Choctaw Nation of Oklahoma, the Miccosukee Tribe of Indians of Florida, the Muscogee (Creek) Nation, the Poarch Band of Creek Indians, the Seminole Tribe of Florida,

the Florida State Historic Preservation Officer (SHPO), the Florida Department of Environmental Protection (FDEP), and the ACHP had an opportunity to provide EPA with comments on the development of the PA beginning in early September 2020. EPA sent letters inviting the consulting parties to participate in NHPA 106 consultation on EPA's undertaking on September 2, 2020. The Agency hosted multiple meetings with the tribes, both individually and as a group.

Initially, EPA invited the eight tribes with interests in Florida to participate in an informational webinar on September 22, 2020. During that webinar, EPA provided information on Florida's request to assume the CWA 404 program and an overview of the NHPA 106 consultation process that would be utilized. The purpose of the webinar was to assist the tribes in deciding whether to participate with EPA on NHPA 106 consultation on the undertaking. EPA explained during that meeting that the Agency planned to enter into a PA that relied on the Operating Agreement (OA) as a foundational document and provided information about where in the docket the OA could be found. EPA also provided email copies of the OA when requested. During the informational webinar, EPA encouraged tribes to identify any issues, concerns or gaps in the OA so that, where appropriate, the Agency could consider those issues as we drafted the PA. On September 28, October 1, October 7, October 8, October 15, October 30 and December 3, 2020, EPA had individual consultation meetings with five tribes and again encouraged each tribe to identify concerns with the OA so that EPA could, where appropriate, consider those issues when drafting the PA. EPA took under advisement all NHPA-related issues raised during these consultation meetings. EPA shared the draft PA with consulting parties on November 25, 2020 and requested comments on the PA by noon December 7, 2020. EPA considered all pertinent, NHPA-related comments received since September 2020 in revising the PA.

5. EPA received feedback that the PA should be more specific with respect to the FDEP's roles and responsibilities.

EPA disagrees with the comment. The PA is specific in setting forth the roles and responsibilities of the FDEP during the 404 permitting process. Further, the roles and responsibilities of FDEP set forth in the PA ensure the consideration of potential impacts on historic and cultural resources, while allowing for necessary flexibility for case-by-case variation. During the meeting hosted by EPA with consulting parties on January 7, 2021, FDEP and the EPA presented information, using flow charts, on specific processes that will apply to Florida's CWA Section 404 program, which included the roles and responsibilities of FDEP with respect to processing individual 404 permits, general 404 permits, and scenarios where human remains are identified. The referenced flow charts are attached to this document and were also provided via email to the parties participating in the calls.

6. EPA received feedback that the meetings with the NHPA parties need to be more than a "check box" and there are doubts regarding whether the PA might be amended.

Consistent with the PA, EPA hosted four meetings with the consulting parties during the 30-day period following the execution of the PA. EPA fully considered all comments and suggestions provided and determined that no amendments were needed to the PA; however, EPA did provide clarification relative to some comments during the meetings. That clarification is also captured in this document. In addition, in response to suggestions for a visual presentation to assist in understanding the permitting process, EPA worked immediately with FDEP to develop and present the requested information in a subsequent meeting (see attached flow charts).

7. EPA received feedback that the PA should further clarify the area of potential effect determination. Whether a site is eligible or potentially eligible for listing in the National Registry of Historic Places (NRHP) is another issue that should be subject to dispute resolution.

EPA considered this recommendation when it was previously provided and addressed it in EPA's December 16, 2020 response to comments, which was issued to the NHPA consulting parties, as follows: "The broad language of subsection 1 and 2 of the PA dispute resolution addresses this concern, specifically the language in subsection 2, "where the consulting parties of the OA cannot agree on the effect determination of a proposed activity." A consulting party could raise a dispute of an effects determination based on a disagreement over an area of potential effects or a disagreement over the NRHP determination." (see p. 29 of EPA's Responses to Comments from the National Historic Preservation Act Section 106 Consulting Parties on Florida's Request for Assumption, December 16, 2020).

8. Regarding proposed activities to be covered under a general permit, EPA received feedback that the 15-day review period for identifying potential historic and cultural properties requesting an application be processed as an individual permit is not consistent with the 30-day period required by the NHPA. Additional review time is needed.

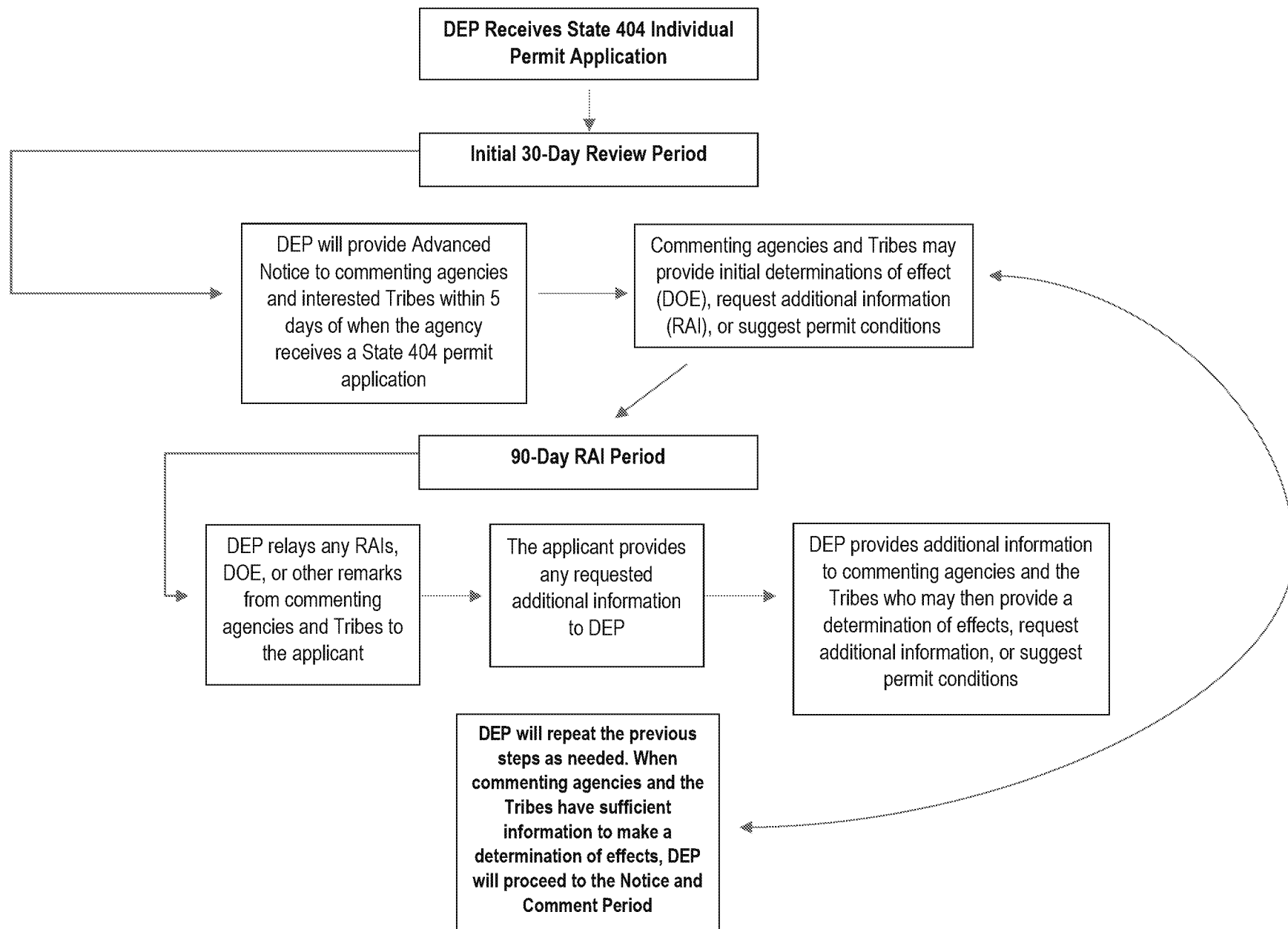
EPA disagrees that the 15-day review period is inconsistent with the requirements of the NHPA. The Tribes and any other interested parties may request additional time for review of proposed activities to be covered under a general permit, and FDEP may consider such requests on a case-by-case basis.

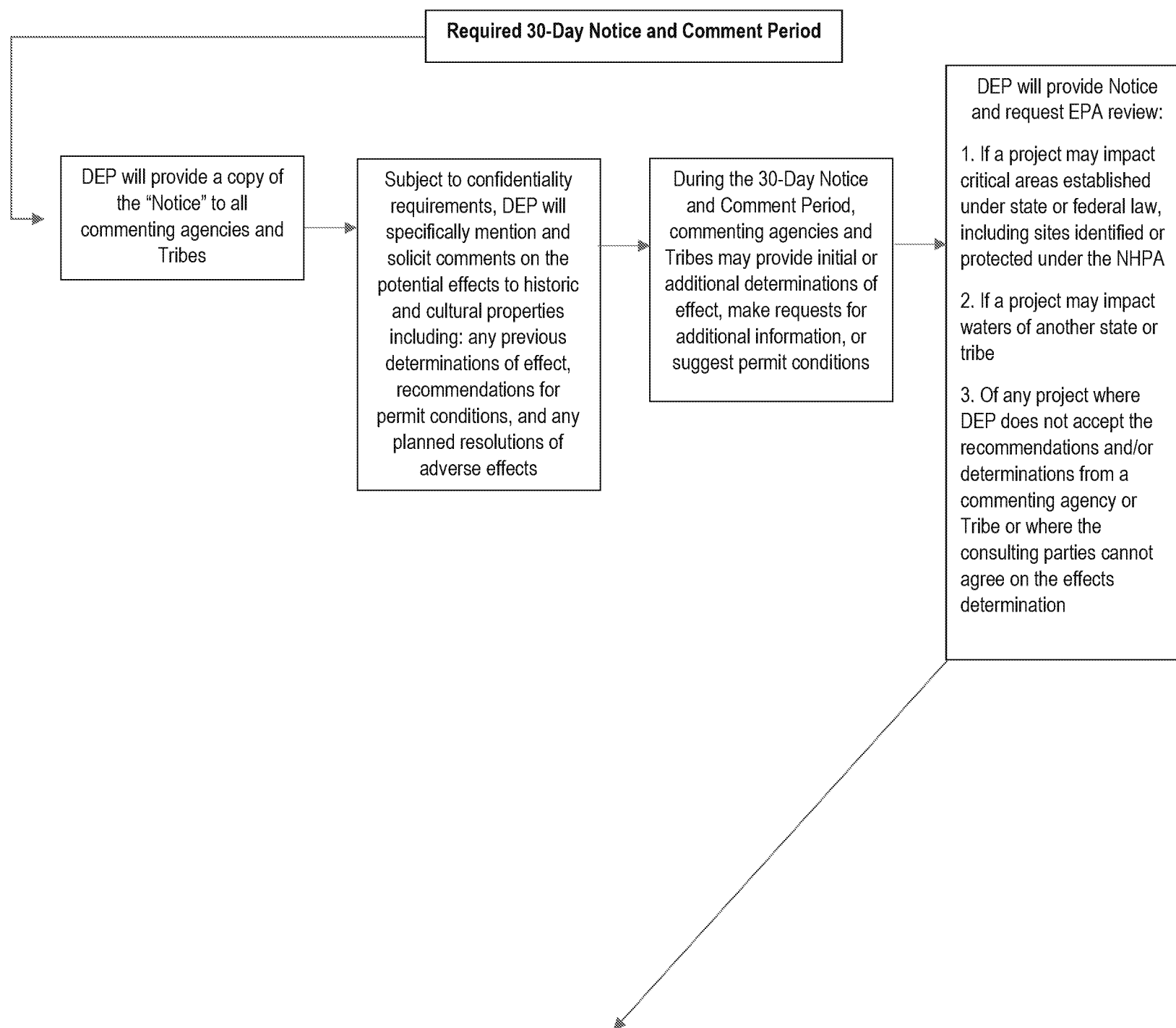
9. EPA received feedback that protocols should be set up regarding the handling and protection of human remains and that a meeting should be scheduled to discuss this matter.

During the meeting hosted by the EPA on January 7, 2021, FDEP and the Florida SHPO expressed interest in participating in a meeting on this matter with the commenting Tribe to discuss further.

10. EPA received feedback requesting clarification on EPA's final action on the PA and 404 Assumption.

The PA became effective upon execution. Execution is defined as signature of all the signatory parties which occurred on December 16, 2020. EPA approved Florida's request to assume administration of a Section 404 program on December 17, 2020. Florida's Section 404 program became effective on December 22, 2020 upon publication in the Federal Register of the notice of EPA's approval.





EPA Review Process

The following process reflects a hypothetical scenario where a permit application is raised for EPA review under the provisions of the Programmatic Agreement.

90 Day Review Period

EPA may review available documentation, consult with Indian tribes, where appropriate, and develop proposed comments, objections, or recommendations.

EPA submits to the ACHP a copy of the proposed comments, objections, or recommendations and other pertinent documentation

Within 30 days, the ACHP may provide EPA an advisory opinion regarding the proposed comments, objections, or recommendations. If the ACHP does not submit an advisory opinion within 30 days of receipt of the EPA's proposed comments, objections, or recommendations, and other pertinent documentation, the EPA will exercise its discretion to finalize such comments, objections or recommendations.

EPA will transmit any final comments, objections, or recommendations to FDEP for resolution.
A copy will be provided to the ACHP, the Florida SHPO, and the Indian tribes where appropriate.

EPA will consider, but need not follow, the ACHP's advisory opinion in finalizing its comments, objections, or recommendations.

If EPA objects to a proposed permit...

EPA will hold a public hearing, if requested.

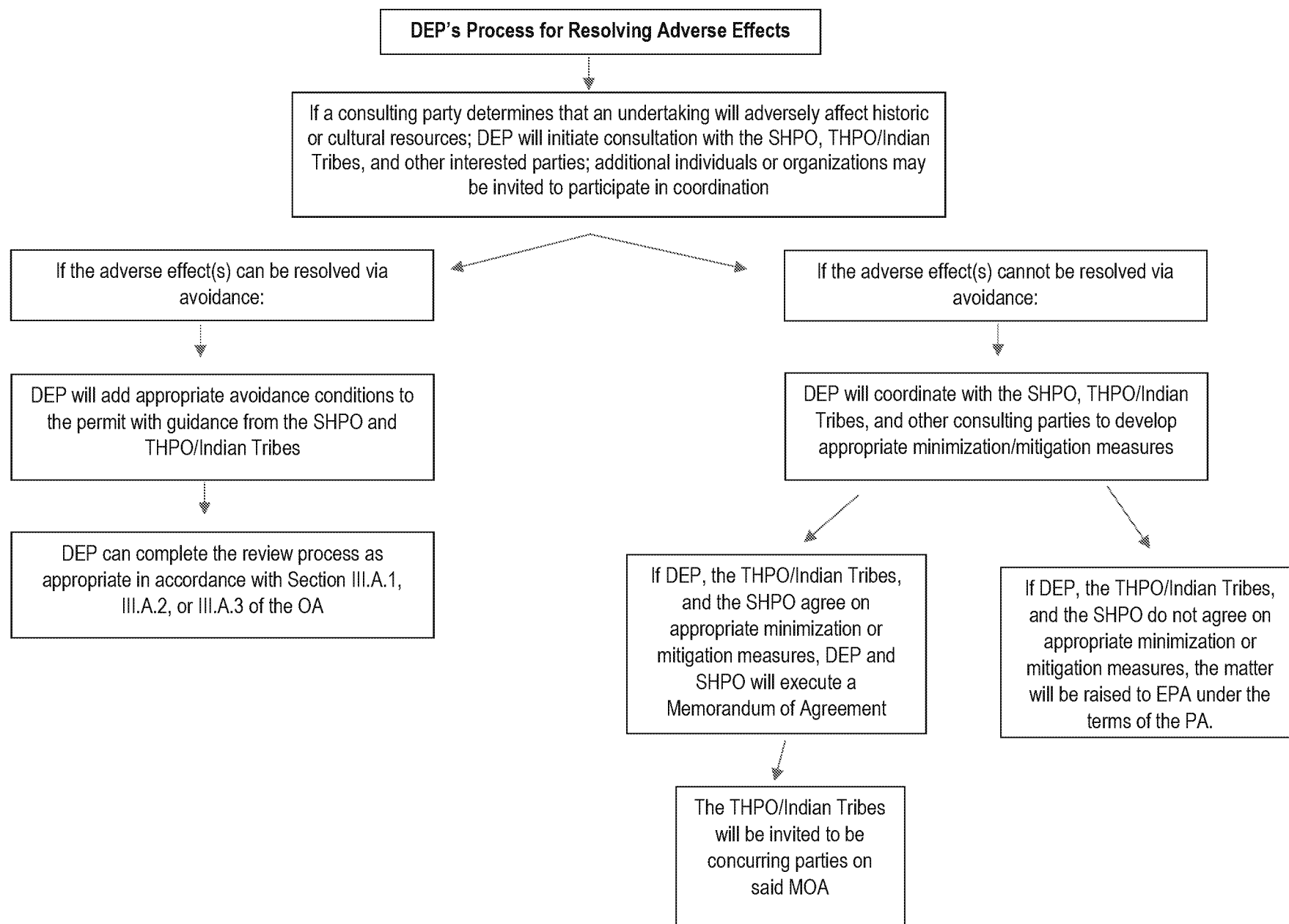
FDEP satisfies EPA comments, objections or recommendations within 90 days?

YES

FDEP may issue the permit.

NO

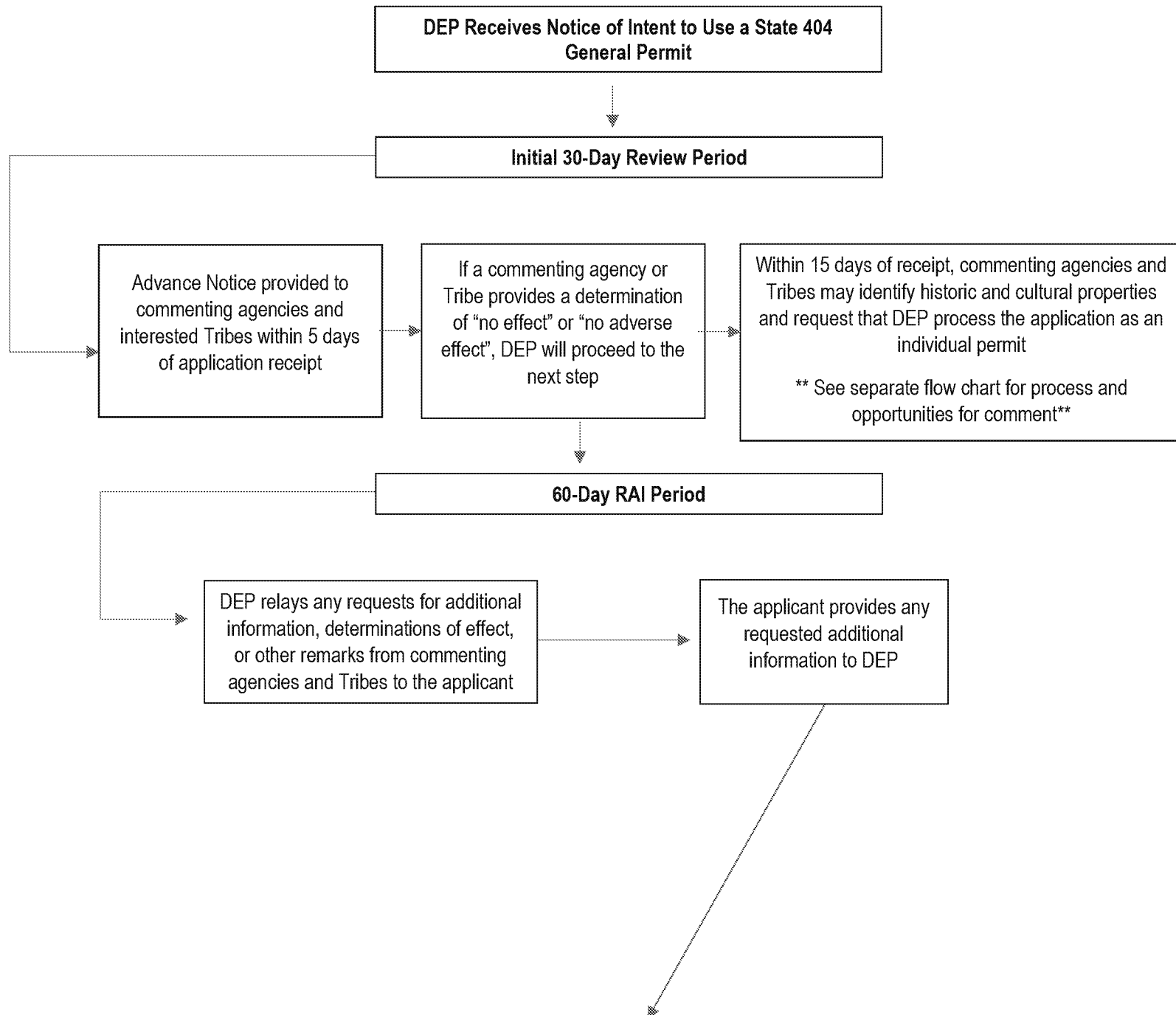
FDEP denies the permit, or the authority to issue the permit is transferred to the Corps.



Final Agency Action

- When deciding whether to issue or deny a State 404 permit application, DEP must consider the effects of the proposed activity on historic and cultural properties; these effects are identified by commenting agencies and Tribes during the application review process
- DEP cannot issue a State 404 permit where adverse effects to historic properties remain unresolved
- All DEP decisions on whether to issue a permit are challengeable under 62-331.010(11), *Florida Administrative Code*
- All issued State 404 Permits will include the following clause: *"In the event of an unanticipated discovery, effects to historic resources, or the identification of unmarked human remains, the Department shall notify the SHPO and THPO/Indian Tribes on the same day the Department is notified by the permittee. Activity authorized by the permit shall not resume without written authorization from the Department, SHPO, and THPO/Indian Tribes."*

The information contained in these flow charts is for information purposes only. It does not alter or change any provisions of the Programmatic Agreement, Operating Agreement, or state or federal law, and any unintended discrepancies will be governed by these authorities.



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Final Agency Action

- If a project activity under a general permit may adversely effect historic or cultural properties, that project is not eligible for a general permit. DEP will process the application as an individual permit.
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